have challenged the verdict in the first trial, because that evidence was all that was necessary to substantiate the earlier charge of consorting. But if the witness's evidence had been confined to the fact that he saw the accused carrying a firearm, an essential element in proving the charge of consorting (viz. that the accused was found in the company of an armed man), would have been omitted. If that had been the effect of his evidence, the verdict in the first trial would not have been challenged because that evidence would not have been sufficient to establish the earlier charge of consorting and would thus have satisfied the test of Grantham, J. in *Reg. v. Ollis;* and as it was (in the words of Lord Alverstone in *Rex v. Bond*) "so connected with the offence charged (of carrying arms) as to form part of the evidence upon which it is proved" it would have been admissible. We agree with the learned Attorney-General that the objection was taken, and the ruling given, too soon.

The learned Judge's view that, upon the authority of *Sambasivam's case,* "any evidence showing that the accused consorted" was inadmissible finds support in the last paragraph of the headnote to the *Malayan Law Reports* at page 129. It is also supported by the Judgment in *Murugiah v. Public Prosecutor*[5]. In our opinion the Judgment in *Sambasivam v. Public Prosecutor* contains nothing which conflicts with the test laid down in *Reg. v. Ollis* or with the principle stated in *Rex v. Bond,* or with section 6 of the Evidence Ordinance. The law is that evidence which shows or tends to show that an accused person was guilty of an offence of which he had been acquitted is admissible at a subsequent (or the same) trial upon a different charge, provided that (a) the evidence is so connected with the offence charged as to form part of the evidence upon which it is to be proved, and (b) the evidence would not have been sufficient to establish the charge of which the accused was acquitted. To this extent, and with the limitation contained in (b), our answer to the question put to us is that such evidence is not inadmissible. It follows that the paragraph of the headnote in the *Malayan Law Reports* of the case of *Sambasivam v. Public Prosecutor,* to which reference has been made, is not correct; and that the case of *Murugiah v. Public Prosecutor,* in so far as it purports to be authority for excluding any evidence which tends to show that the accused was guilty upon a charge of which he has been acquitted in considering his guilt upon another charge, must be regarded as overruled.

Order accordingly.

AL. AL. ALAGAPPA CHETTIAR v. RAMARATNAM NAIDU.

[Orig. Civ. Juris. (Paul Storr, J.) August 18, 1951]

[Johore Bahru — Originating Motion No. 12 of 1949]

Japanese Judgments and Civil Proceedings Ordinance, 1946, s. 3 — Application of equitable principles under s. 3(2) — Civil Procedure Code s. 467 — Service on persons interested — When setting aside a Japanese Order held to be a nullity — O. 2 rr. 23 and 24 of the Civil Procedure Rules (Johore).

In this Originating Motion the post-war administrator of the estate of St. P. S. Subramaniyan Chettiar deceased made an application under Section 3 of the Japanese Judgment and Civil Proceedings Ordinance to set aside an ex-parte Order of Court made during the Japanese occupation. During the occupation an order for the sale of the property belonging to the estate was applied for by the Official Administrator of Johore, who did not serve the application on the beneficiaries of the estate and there was no order made to dispense with service.

Held, (1) that order obtained by an administrator for sale of estate properties belonging to the estate of an intestate, without service of the application on some persons mentioned in Section 469 of the Civil Procedure Code (F.M.S.) is a nullity; (2) that the Court has power to impose terms on the party seeking to set aside a Japanese Order, while setting aside such order held to be a nullity.

Cases referred to :—

(1) *Craig v. Kanseen* (1943) 1 All E.R. 108; (1943) 1 K.B. 262.

(2) *In re Maria Hertogh* (1950) M.L.J. 214.

(3) *In the Estate of Haji Fatimah* 6 F.M.S.L.R. 154.

(4) *In re Ponder* (1921) 2 Ch. 59.

(5) *Lord Sudeley v. Attorney-General* (1897) A.C. 11.

(6) *Vanneck v. Benham* (1917) 1 Ch. 60.

ORIGINATING MOTION.

Dr. C. H. Wilhers-Payne and *A. Muthuswamy* for the applicant.

K. A. Seth for the respondent.

Cur. Adv. Vult.

Paul Storr, J. : — This is an application to set aside an order made by the Japanese Court during the Japanese occupation. It is made under section 3 of the Japanese Judgments and Civil Proceedings Ordinance No. 29 of 1946.

The terms of the application are :—

"That the Order of a Japanese Court dated the 21st day of February 2605 (1945) in Originating Summons No. 7 of 2605 (1945) in the Court of the Judge at Johore Bahru and issued on the same day giving liberty to Inche Suleiman bin A. Rahman as Official Administrator to sell all those pieces of land comprised in Surat

Sementara No. 32 of 1925 and Johore Government Lease No. 326 Lot 781 and also Johore Government Lease No. 327 Lot No. 782 by private treaty at a price not less than $30,842 be set aside wholly."

And in accordance with O. 2 rr. 23 and 24 of the Civil Procedure Rules (Johore) the grounds are stated to be :—

"(1) The appointment of the Official Administrator by an Order of the Court on the 27th April 2604 (1944) in Letters of Administration No. 17 of 2604 (1944) in the Supreme Court at Johore Bahru for the purpose of administration of the estate of S.T.P.S. Subramanian Chettiar, deceased, was wrongly and illegally made for the following reasons:—

(a) that the petition filed by the then Japanese Official Administrator, Johore, dated the 19th day of April 2604 (1944) for Letters of Administration to the estate of S.T.P.S. Subramanian Chettiar, deceased, was under the provisions of section 165 (iii) of the Johore Probate and Administration Enactment No. 22 and that the Grant of Letters of Administration was specifically made under that section. There were no facts which could entitle the Official Administrator to apply under the aforesaid section and for the Court to order grant of Letters of Administration under the said section. There was no former grant of Letters of Administration issued to any person which could have been revoked or which was in fact revoked. The whole proceedings were irregular and vitally defective and the Japanese Court made an illegal order under wrong assumption of facts;

(b) that the necessary parties, e.g. Meyamai Achi, the lawful widow and relict of S.T.P.S. Subramanian Chettiar, deceased, (hereinafter referred to as the intestate and Palaniappa Chettiar alias S.P.S.T. Muthu Palaniappa Chettiar, grandson of the intestate, being beneficiaries entitled to distributive shares in the estate of the intestate, were not served with any citation or notice of the proceedings;

(c) that the intestate was an Indian and a British subject at the time of the commencement of hostilities and continued to be a British subject till his death, i.e. 9th July, 1943, at Batu Pahat. The intestate was therefore, according to international law an enemy to the Japanese authorities then in occupation of Malaya, and the estate left by him should have been taken over into custody by the Japanese Custodian of Enemy Property, Johore. The Official Administrator appointed by the Japanese authorities had no lawful grounds or authority to apply for Letters of Administration to the estate of the intestate and take over administration or management thereof.

[Grounds 2–5 are omitted as not being relevant for this report — Ed. M.L.J.]

(6) That the application was made in the absence of the necessary party or parties.

(a) It will be contended that in an application to sell land belonging to the estate of a deceased intestate, beneficiaries or at least one of them or at least a person purporting to represent the the interest of the beneficiaries affected by such an order must be made a party to such application or served with such application and that any Order of Court obtained in the absence of such parties as required under the Civil Procedure Code is illegal and liable to be set aside.

(b) That no beneficiary or any person representing the interest of the beneficiaries were made a party to the said application or served with the said application.

[Grounds 7–12 are omitted as not being relevant to this report — Ed. M.L.J.]

By an order of the Court dated 17th December, 1949, it was ordered that this Motion should be tried with *viva voce* evidence of such witnesses the parties wish to call, such witnesses being subject to cross-examination.

Dr. Withers-Payne and Mr. Muthuswamy appeared for the applicant and Mr. Kenneth Seth for the respondent.

After hearing the evidence called for the parties and considering the very able arguments put up by Counsel, I have come to the following conclusions.

With regard to grounds (1) (a), (b) and (c), the Order that it is sought to set aside was made on the application of the Official Administrator, Johore, who had been appointed by the Japanese Court and I do not think at the hearing of the application by the Japanese Court it would have been competent for that Court to have gone into the question of whether the Official Administrator had been properly appointed Administrator of the estate of S. T. P. S. Subramanian Chettiar, deceased, neither do I think that in the present application it is competent for me to consider the question of the granting of the Letters of Administration to the Official Administrator in Petition No. 17 of 2604. I therefore consider that if grounds (1) (a), (b) and (c) were the only grounds of the application, the application must fail.

After dealing with the grounds omitted in this report His Lordship continued. There remains therefore grounds (6) (a) and (b). It was submitted by Dr. Withers-Payne on behalf of the applicant that the application, Originating Summons 7 of 2605, on which the order sought to be set aside was granted, was made by the Official Administrator under the provsions of section 83 (iii) of the Probate and Administration Enactment (Cap. 22, Johore) which reads as follows :—

"83. (iii) An administrator may not, without the previous permission of the Court by which the letters of administration were granted.

(a) mortgage, charge or transfer by sale, gift, exchange or otherwise any immovable property for the time being vested in him under section 4; or

(b) lease any such property for a term exceeding five years."

and that such an application being by Originating Summons was governed by the Civil Procedure Rules (Johore) and by section 467 (i) (f) of the Civil Procedure Code which reads :—

"467. (i) The executors or administrators of a deceased person, or any of them, and the trustees under

any instrument, or any of them, and any person claiming to be interested in the relief sought as creditor, devisee, legatee, or next-of-kin of a deceased person, or as cestui que trust under the trusts of any instrument, or as claiming by assignment or otherwise under any such creditor or other person as aforesaid, may take out as of course an originating summons returnable in Chambers, for such relief of the nature or kind following as may by the summons be specified and as the circumstances of the case may require, that is to say, the determination, without an administration of the estate or trust, of any of the following questions or matters —

(f) the approval of any sale, purchase, compromise, or other transaction"

and the persons to be served by section 469, Civil Procedure Code, which reads :—

"469. The persons to be served with the summons under the last two preceding sections in the first instance shall be the following, that is to say —

A. Where the summons is taken out by an executor or administrator or trustee:

(a) for the determination of any question under paragraph (a), (e), (f), or (g) of Section 467(i), the persons or one of the persons whose rights or interests are sought to be affected"

and that the widow, Meyammai Achi, and the grandson, Palaniappa Chettiar, the sole surviving next-of-kin of the deceased being persons interested should have been served or some person ordered by the Court to represent them, but as it was taken by the Japanese Court *ex parte* and not served on any one at all and no order was obtained to dispense with service on interested parties or for some person to represent their interests, the whole proceedings became a nullity. He referred to *Craig v. Kanseen*[1] which was followed by Evans, J. in the Court of Appeal, Singapore, *In re Maria Hertogh*[2] where he says :—

"It is unnecessary in our opinion to go into the distinctions between irregularities and nullities. Counsel referred to **Craig v. Kanseen** in which Lord Greene, M.R. said:—

"In my opinion, it is beyond question that failure to serve process where service of process is required goes to the root of our conceptions of the proper procedure in litigation. Apart from proper **ex parte** proceedings, the idea that an order can validly be made against a man who has had no notification of any intention to apply for it has never been adopted in this country. It cannot be maintained that an order which has been made in these circumstances is to be treated as a mere irregularity and not as something which is affected by a fundamental vice."

That case followed **Hewitson v. Fabre**, one of the only other reported cases as to a nullity arising on a point of service. The Master of the Rolls quoted from the judgment in **Fry v. Moore** where an order for substituted service was obtained when personal service could not have been affected, and the defect was considered a mere irregularity. That seems a much finer point. In all those cases service of some document was effected, or at least attempted, but here there is complete omission, the only true remedy for which would be to recommence. The omission, therefore, seems of necessity, to render the proceedings a nullity",

and also to *In the Estate of Haji Fatimah*[3] where it was held by the Court of Appeal, Federated Malay States, that an application by an administrator for sale under section 94(iii), Probate and Administration Enactment, F.M.S. (identical with section 83(iii) of the Johore Enactment) must be by Originating Summons and must be served on one at least of the beneficiaries.

Mr. Seth for the respondent admitted that the Originating Summons 7 of 2605 was not served on the widow or grandson of the deceased and submitted that such service was not necessary because the widow and grandson of the deceased were not "persons whose rights or interests are sought to be affected" by the sale. He referred to *In re Ponder*[4], *Lord Sudeley v. Attorney-General*[5] and *Vanneck v. Benham*[6] to show that no beneficiary under an intestacy has any right to or interest in any specific property until the debts are paid and the estate has been cleared of debts and estate duty, and that therefore the widow and grandson of the deceased had no interest in the specific property ordered to be sold and could not have opposed the sale. Further that under section 3(2) of the Japanese Judgments and Civil Proceedings Ordinance No. 29 of 1946, even if the Court held that the non-service made the proceedings a nullity, the Court had an overriding discretion "to make such order as in the circumstances of the case may seem just" and in this particular case as the estate had in fact benefited by the action of the Official Administrator who had paid the estate duty out of the proceeds which amount need not have been paid again by the present administrator and could in any event be re-claimed, vide section 7 of the Estate Duties (Apportionment of Miscellaneous Provisions) Ordinance No. 27 of 1949, the Court should not set aside the order.

The whole case appears to me to resolve itself upon the question: Were the widow and grandson of the deceased "one of the persons whose rights or interests are sought to be affected" by the order? If so they should have been served with the application for sale.

From the authorities cited, I think it is clear as stated in *Williams on Executors*, 12th Edn. p. 992, "Subject to the payment of debts, the whole estate of the intestate was (before 1926) the property of the persons entitled on intestacy". I have therefore come to the conclusion that they have an interest in the ultimate residuary estate and on any application for sale by an administrator during the course of his administration that interest is likely to be affected, i.e. if the sale was at an undervalue, and that they are therefore persons whose rights or interests were sought to be affected and one at least should have been served or there should have been an order dispensing with such service or some person should have been appointed

to represent their interests. No such orders were obtained and therefore, there being no service at all of the Originating Summons, I hold that the proper parties were not before the Court and, following the decisions of *Craig v. Kanseen*[1], *In re Maria Hertogh*[2] and *In the Estate of Haji Fatimah*[3] that the proceedings taken by the Official Administrator in Originating Summons 7 of 2605 were a nullity.

It was admitted that the purchase price of $30,842 (Occupation currency), was paid and there can be little doubt that the real purport of this application is to pave the way to setting aside the transfers and respondent's title. Mr. Seth has referred me to section 3 (2) of Ordinance 29 of 1946 and asked that as the respondent was an innocent purchaser for value I should not set aside the order even if I decided it was a nullity as such a course would be most inequitable. I have considered the question raised by Mr. Seth very carefully and taken into account the fact that from the evidence before me the respondent has, apart from having the titles registered in her name, obtained little, if any, benefit from the transaction, the rents apart from a few months' being collected by the applicant or the applicant's agent. However, in view of the provisions of section 7 of the Estate Duties (Apportionment of Miscellaneous Provisions) Ordinance No. 27 of 1949 the estate can obtain the benefit of the estate duty paid by the Official Administrator and therefore, exercising the discretion vested in me by section 3 (2) of the Japanese Judgments and Civil Proceedings Ordinance No. 29 of 1946, I set aside the order made on Originating Summons 7 of 2605, the subject matter of this application, and I order that the applicant do pay to the respondent the sum of $20,466.64 being $20,011.60 the amount of the estate duty and interest for which the estate will benefit under section 7 of Ordinance No. 27 of 1949 and $455.04 being the value of $10,830.40 (Occupation currency) the balance of the amount paid to the Official Administrator on 25th February, 1945, in pursuance of the Order of Court at the revalued rate under the Debtor and Creditor (Occupation Period) Ordinance No. 42 of 1948 within 14 days of the setting aside of the transfers and the rectification of the Register in respect of Johore Government leases Nos. 326 and 327 and the setting aside and cancelling of the agreement for sale and power of attorney in respect of the lands comprised in Surat Sementara No. 32 of 1925.

As to the costs of the application, in view of the fact that the majority of the time of the Court was taken up by grounds alleged by the applicant in which he was not successful, I order that each party should pay its own costs of this application.

The applicant is however entitled to an order for his costs as between Solicitor and Client to be paid out of the estate of S. T. P. S. Subramanian Chettiar (deceased).

Order accordingly.

In re MARIA HUBERDINA HERTOGH; INCHE MANSOR ADABI v. ADRIANUS PETRUS HERTOGH AND ANOR.

[Court of Appeal (Foster Sutton, C.J. (F. of M.), Wilkinson and Wilson, JJ.) August 30, 1951]

[Singapore — Civil Appeal No. 29 of 1950]

Guardianship of Infants Ordinance s. 11 — Marriage of Infant — Validity of marriage — Domicile of Infant — Muslim Marriage — Declaration of validity of Marriage — Jurisdiction of Supreme Court.

This was an appeal against the decision of Mr. Justice Brown reported in (1951) M.L.J. 12. The principal grounds of appeal were (1) that the Court had no jurisdiction to declare the marriage between the female infant and Inche Mansor Adabi to be illegal and void and of no effect, (2) that the female infant was a Muslim in fact and in law and that her marriage to Inche Mansor Adabi was valid.

Held, (1) that the Court in the exercise of its chancery jurisdiction had no power to make a formal declaration that the marriage was illegal and void and of no effect and therefore the judgment of the Court below must be varied by deleting that portion of it containing such declaration; (2) that the female infant in this case was domiciled in Holland and as there was no evidence that the domicile of Mansor Adabi was Singapore, the law of Holland would be applicable to determine the validity of the marriage; (3) that as the marriage would be void by the law of Holland the appellant had not shown that there was a valid marriage between him and the female infant and therefore the custody of the infant was rightly given to her parents.

Cases referred to :—

(1) *Cheang Thye Phin v. Tan Ah Loy* (1920) A.C. 369.
(2) *Chapman v. Bardley* 46 E.R. 842.
(3) *In re Paine* (1940) 1 Ch. 46.
(4) *Barker v. Edger* (1898) A.C. 754.
(5) *Duchess of Kingston's Case* 2 Smith's Leading Cases 13th Ed., 644.
(6) *In re Agar-Ellis* 24 Ch. D. 317.
(7) *Skinner v. Orde* L.R. 4 P.C. 60.
(8) *Sottomeyer v. De Barros* 3 P.D. 1; 5 P.D. 94.
(9) *Ogden v. Ogden* (1908) P.D. 46.
(10) *De Reneville v. De Reneville* (1948) P.D. 100.